

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

Jul 09, 2018

SEAN F. McAVOY, CLERK

TIMOTHY J.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

No. 1:17-CV-03125-JTR

ORDER GRANTING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

**BEFORE THE COURT** are cross-motions for summary judgment. ECF Nos. 14, 15, 19. Attorney D. James Tree represents Timothy J. (Plaintiff); Special Assistant United States Attorney Daphne Banay represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 7. After reviewing the administrative record and briefs filed by the parties, the Court **GRANTS** Defendant's Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

**JURISDICTION**

Plaintiff filed applications for Supplemental Security Income (SSI) and Disability Insurance Benefits (DIB) on May 1, 2013, Tr. 49-50, 671-91, alleging

1 disability since June 9, 2012, Tr. 288, 672, due to deep vein thrombosis in both  
2 legs, bilateral carpal tunnel syndrome, cellulitis, a right leg and ankle injury,  
3 learning disability, color blindness, and right shoulder separation from socket, Tr.  
4 287, 672. The applications were denied initially and upon reconsideration. Tr. 70-  
5 72.<sup>1</sup> Administrative Law Judge (ALJ) Tom L. Morris held hearings on January 16,  
6 2015 and August 13, 2015 and heard testimony from Plaintiff and vocational  
7 experts, Leta Berkshire and Kimberly Mullinax. Tr. 702-75. The ALJ issued an  
8 unfavorable decision on March 16, 2016. Tr. 16-29. The Appeals Council denied  
9 review on May 23, 2017. Tr. 7-9. The ALJ's March 16, 2016 decision became the  
10 final decision of the Commissioner, which is appealable to the district court  
11 pursuant to 42 U.S.C. §§ 405(g), 1383(c). Plaintiff filed this action for judicial  
12 review on July 26, 2017. ECF Nos. 1, 4.

### 13 **STATEMENT OF FACTS**

14 The facts of the case are set forth in the administrative hearing transcript, the  
15 ALJ's decision, and the briefs of the parties. They are only briefly summarized  
16 here.

17 Plaintiff was 48 years old at the alleged date of onset. Tr. 671. He  
18 completed the twelfth grade in 1981. Tr. 288. His reported work history includes  
19 the jobs of dishwasher, maintenance, retail associate, general laborer, janitor, and  
20 line worker. Tr. 275, 289, 300. Plaintiff reported that he stopped working on June  
21 9, 2012 due to his conditions. Tr. 288.

### 22 **STANDARD OF REVIEW**

23 The ALJ is responsible for determining credibility, resolving conflicts in  
24 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,

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25  
26 <sup>1</sup>The record only contains the reconsideration determination dated  
27 September 25, 2013. Tr. 70-72. The ALJ's decision contains a reference to an  
28 August 21, 2013 initial denial. Tr. 16.

1 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,  
2 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d  
3 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is  
4 not supported by substantial evidence or if it is based on legal error. *Tackett v.*  
5 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as  
6 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put  
7 another way, substantial evidence is such relevant evidence as a reasonable mind  
8 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402  
9 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational  
10 interpretation, the court may not substitute its judgment for that of the ALJ.  
11 *Tackett*, 180 F.3d at 1097. If substantial evidence supports the administrative  
12 findings, or if conflicting evidence supports a finding of either disability or non-  
13 disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d  
14 1226, 1229-30 (9th Cir. 1987). Nevertheless, a decision supported by substantial  
15 evidence will be set aside if the proper legal standards were not applied in  
16 weighing the evidence and making the decision. *Browner v. Secretary of Health*  
17 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

### 18 **SEQUENTIAL EVALUATION PROCESS**

19 The Commissioner has established a five-step sequential evaluation process  
20 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),  
21 416.920(a); *see Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one  
22 through four, the burden of proof rests upon the claimant to establish a prima facie  
23 case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-99. This  
24 burden is met once the claimant establishes that physical or mental impairments  
25 prevent him from engaging in his previous occupations. 20 C.F.R. §§  
26 404.1520(a)(4), 416.920(a)(4). If the claimant cannot do his past relevant work,  
27 the ALJ proceeds to step five, and the burden shifts to the Commissioner to show  
28 that (1) the claimant can make an adjustment to other work, and (2) specific jobs

1 which the claimant can perform exist in the national economy. *Batson v. Comm’r*  
2 *of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-94 (9th Cir. 2004). If the claimant  
3 cannot make an adjustment to other work in the national economy, a finding of  
4 “disabled” is made. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

### 5 ADMINISTRATIVE DECISION

6 On March 16, 2016, the ALJ issued a decision finding Plaintiff was not  
7 disabled as defined in the Social Security Act.

8 At step one, the ALJ found Plaintiff had not engaged in substantial gainful  
9 activity since June 9, 2012, the alleged date of onset. Tr. 19.

10 At step two, the ALJ determined Plaintiff had the following severe  
11 impairments: deep vein thrombosis (DVT) and cellulitis of the lower extremities;  
12 degenerative changes of the right shoulder; and a history of a remote right ankle  
13 fracture. Tr. 19.

14 At step three, the ALJ found Plaintiff did not have an impairment or  
15 combination of impairments that met or medically equaled the severity of one of  
16 the listed impairments. Tr. 22.

17 At step four, the ALJ assessed Plaintiff’s residual function capacity and  
18 determined he could perform a full range of light work with the following  
19 limitations:

20 The claimant should be allowed to periodically alternate standing with  
21 sitting, provided that work tasks can still be accomplished during such  
22 shifts and that the tasks can be done in either the sitting or standing  
23 position for temporary or longer periods.

24 The claimant can occasionally climb ladders, ropes, and scaffolds. The  
25 claimant can occasionally stoop, kneel, crouch, and crawl. The  
26 claimant can occasionally reach overhead with the right upper  
27 extremity. The claimant should avoid concentrated exposure to hazards  
28 (i.e., dangerous machinery, unprotected heights, etc.). The claimant  
should avoid concentrated exposure to extreme cold.

Tr. 22. The ALJ identified Plaintiff's past relevant work as janitor, doorkeeper, kitchen helper, assembler, commercial cleaner, and agricultural fruit sorter and concluded that Plaintiff was not able to perform this past relevant work. Tr. 27.

At step five, the ALJ determined that, considering Plaintiff's age, education, work experience and residual functional capacity, and based on the testimony of the vocational expert, there were other jobs that exist in significant numbers in the national economy Plaintiff could perform, including the jobs of cashier II, storage facility rental clerk, and furniture rental consultant. Tr. 28. The ALJ concluded Plaintiff was not under a disability within the meaning of the Social Security Act at any time from June 9, 2012, through the date of the ALJ's decision. Tr. 29.

### ISSUES

The question presented is whether substantial evidence supports the ALJ's decision denying benefits and, if so, whether that decision is based on proper legal standards. Plaintiff contends the ALJ erred by (1) failing to properly weigh the opinion of Qilin Lu, M.D., (2) failing to consider Plaintiff's obesity, (3) improperly assessing the residual functional capacity as light and applying the incorrect grid rules, and (4) failing to properly address Plaintiff's symptom statements.

### DISCUSSION

#### 1. Qilin Lu, M.D.

Plaintiff argues the ALJ failed to properly consider and weigh the medical opinion expressed by treating physician Dr. Lu. ECF No. 15 at 6-12.

In weighing medical source opinions, the ALJ should distinguish between three different types of physicians: (1) treating physicians, who actually treat the claimant; (2) examining physicians, who examine but do not treat the claimant; and, (3) nonexamining physicians who neither treat nor examine the claimant. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). The ALJ should give more weight to the opinion of a treating physician than to the opinion of an examining physician. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). Likewise, the ALJ

1 should give more weight to the opinion of an examining physician than to the  
2 opinion of a nonexamining physician. *Id.*

3 When a treating physician's opinion is not contradicted by another  
4 physician, the ALJ may reject the opinion only for "clear and convincing" reasons.  
5 *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991). When a treating  
6 physician's opinion is contradicted by another physician, the ALJ is only required  
7 to provide "specific and legitimate reasons" for rejecting the opinion. *Murray v.*  
8 *Heckler*, 722 F.2d 499, 502 (9th Cir. 1983). The specific and legitimate standard  
9 can be met by the ALJ setting out a detailed and thorough summary of the facts  
10 and conflicting clinical evidence, stating his interpretation thereof, and making  
11 findings. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). The ALJ is  
12 required to do more than offer his conclusions, he "must set forth his  
13 interpretations and explain why they, rather than the doctors', are correct."  
14 *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988).

15 Dr. Lu started treating Plaintiff on May 1, 2014. Tr. 473-76. Dr. Lu  
16 completed a form for Plaintiff's attorney on August 1, 2014. Tr. 494-96. When  
17 asked to list Plaintiff's diagnoses, he included diabetes as stable, recurrent DVT on  
18 Coumadin and stable, high cholesterol as stable, and right leg old fracture with  
19 ongoing pain. Tr. 494. He stated that work on a regular and continuous basis  
20 would cause Plaintiff's condition to deteriorate due to worsening pain with  
21 prolonged standing. Tr. 495. He limited Plaintiff to sedentary work defined on the  
22 form as "[c]an lift 10 pounds maximum and frequently lift and/or carry articles  
23 such as dockets, ledgers, and small tools. Although a sedentary job involves  
24 sitting, a certain amount of walking and standing may be necessary." *Id.* He stated  
25 that Plaintiff had no manipulative limitation in his upper extremities. *Id.* He  
26 opined that Plaintiff's limitations had existed since before 2014. Tr. 496.

27 The ALJ gave Dr. Lu's opinion little weight for five reasons: (1) it was  
28 based on Plaintiff's diabetes and high cholesterol, (2) it was based on Plaintiff's

1 DVT, (3) it was based on Plaintiff's former right ankle injury, (4) it was  
2 inconsistent with his treatment notes, and (5) it was inconsistent with Plaintiff's  
3 own reports. Both parties agree that the specific and legitimate standard applies in  
4 determining whether the ALJ provided legally sufficient reasons for rejecting the  
5 opinion. ECF Nos. 19 at 3, 20 at 2.

6 The ALJ's first reason for rejecting the opinion, that it was based on  
7 Plaintiff's diagnoses of diabetes and high cholesterol, is not supported by  
8 substantial evidence. The ALJ stated that Dr. Lu "based [his] opinion on the  
9 claimant's diabetes and high cholesterol. Medical records since 2010, however,  
10 reveal no complaints, complications, or physical restrictions relating to either  
11 condition." Tr. 26. Here, the ALJ is premising the rejection on the assumption  
12 that Dr. Lu found the impairments of diabetes and high cholesterol to be the cause  
13 of Plaintiff's functional limitations. Tr. 26. This is not supported by substantial  
14 evidence. In his opinion, Dr. Lu never indicated that Plaintiff's diabetes or high  
15 cholesterol were associated with any impairments. Tr. 494-96. Dr. Lu only  
16 provided these conditions under the second prompt title "Diagnoses." Tr. 494.  
17 Throughout the opinion, he was asked to describe Plaintiff's symptoms, signs,  
18 treatment, and side effects of medications. *Id.* Dr. Lu never indicated that any  
19 symptom or medication side effect resulting from Plaintiff's diabetes or high  
20 cholesterol. *Id.* As such, the ALJ's rationale is not supported by substantial  
21 evidence.

22 The ALJ's second reason for rejecting the opinion, that it was based on  
23 Plaintiff's DVT, is specific and legitimate. The ALJ stated the following:

24 Dr. Lu based [his] opinion on the claimant's deep vein thrombosis.  
25 However, as noted even by Dr. Lu, this condition has been stable on  
26 Coumadin. Indeed, a review of Dr. Lu's medical records since the  
27 claimant began Coumadin shows consistently normal inspections of the  
28 lower extremities, with no signs of edema, cyanosis, or varicosities.

Tr. 26. The ALJ is accurate that while Dr. Lu closely monitored Plaintiff's blood work, the physical exams showed normal examinations of the lower extremities. Tr. 475, 479, 502, 511, 531, 611, 621, 639. There is evidence that Dr. Lu based his limitations on the diagnosis of DVT, stating that signs of Plaintiff's impairments included an "old ankle fracture with recurrent DVT." Tr. 494. Additionally, Dr. Lu found that Plaintiff's pain increased with prolonged standing. *Id.* Therefore, the ALJ's interpretation of the opinion, that the limitations were based on an asymptomatic DVT, is reasonable. An opinion being inconsistent with a provider's treatment notes is a specific and legitimate reason to reject the opinion. *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005). Here, the limitation to sedentary work is not supported by consistently normal examinations of the lower extremities. As such, this reason is sufficient to support the ALJ's rejection of the opinion.

The ALJ's third reason for rejecting the opinion, that it was based on Plaintiff's old right ankle injury, is specific and legitimate. The ALJ found that "Dr. Lu based [his] opinion on the claimant's old right ankle fracture, which occurred in the early 1990s. However, as noted above, the claimant was subsequently able to work in various light or medium jobs that required him to stand/walk for up [to] 8 hours in an 8-hour workday." Tr. 26.

The old ankle injury was the major impairment that resulted in limitations according to Dr. Lu's opinion. Tr. 494-96. When asked what limitations cause pain, Dr. Lu stated that the ankle injury caused pain. Tr. 494. It was this pain that affected Plaintiff's ability to work on a regular and continuous basis. Tr. 495. Plaintiff asserts that the ALJ overlooked the ankle being reinjured in 2009. ECF No. 15 at 9-10. However, the ALJ specifically addressed the record post 2009, stating that "a review of the medical records from 2009 through 2015 reveals appointments to address leg issue involving cellulitis and deep vein thrombosis, but essentially no complaints, treatment, or workup for the right ankle." Tr. 24.



1 The ALJ is accurate that there is a lack of complaints regarding ankle pain in the  
2 record. Tr. 406 (“He denies any increased pain with movement of his ankle.”).  
3 The only time Plaintiff reports ankle pain is to the consultative examiner, Tr. 442-  
4 44, and at the hearing, Tr. 721. The record supports the ALJ’s conclusion that Dr.  
5 Lu’s opinion was based on the right ankle injury, which appears asymptomatic in  
6 the record and does not support the limitation to sedentary work. Therefore, this  
7 reason meets the specific and legitimate standard.

8 The ALJ’s fourth reason for rejecting Dr. Lu’s opinion, that it was  
9 inconsistent with his treatment notes, is specific and legitimate. An opinion being  
10 inconsistent with a provider’s treatment notes is a specific and legitimate reason to  
11 reject the opinion. *Bayliss*, 427 F.3d at 1216. As discussed above, Dr. Lu’s notes  
12 show substantially normal physical observations regarding Plaintiff’s lower  
13 extremities. This is inconsistent with the opinion that Plaintiff’s functional  
14 limitations stemming from his DVT and his old right ankle injury limit him to  
15 sedentary work. Therefore, this is sufficient to support the rejection of the opinion.

16 The ALJ’s fifth reason for rejecting Dr. Lu’s opinion, that it was inconsistent  
17 with Plaintiff’s own reports, is not specific and legitimate. The ALJ stated that  
18 Plaintiff reported “that he can lift up to 20 pounds and walk for up to 1 hour or up  
19 to 2 miles before his symptoms flare up.” Tr. 27. On July 25, 2013, Plaintiff  
20 reported that he can walk for about an hour. Tr. 437. On July 27, 2013, Plaintiff  
21 reported that he can walk approximately two miles or stand for 20 minutes before  
22 he has right ankle pain. Tr. 443. A claimant’s testimony about his daily activities  
23 may be seen as inconsistent with the presence of a disabling condition. *Curry v.*  
24 *Sullivan*, 925 F.2d 1127, 1130 (9th Cir. 1990). However, the ALJ failed to state  
25 how the ability to stand and walk for limited periods of time is inconsistent with  
26 Dr. Lu’s opinion. Therefore, this reason fails to meet the specific and legitimate  
27 standard.

28 ///

1 Plaintiff also alleges that the ALJ erred by failing to consider the factors set  
2 forth in 20 C.F.R. §§ 404.1527(c), 416.927(c). ECF No. 15 at 7-8. The ALJ is to  
3 consider all medical opinions that are a part of the record, and unless the ALJ gives  
4 a treating source's opinion controlling weight, he is to consider the following  
5 factors when assigning weight to an opinion: examining relationship, treatment  
6 relationship, supportability, consistency, specialization, and other factors. 20  
7 C.F.R. §§ 404.1527(c), 416.927(c). Plaintiff asserts that the ALJ's failure to  
8 consider and apply these factors constitutes reversible error. ECF No. 15 at 8  
9 (*citing Trevizo v. Berryhill*, 871 F.3d 664, 676 (9th Cir. 2017)). However, the  
10 ALJ's reasons for rejecting the opinion speak to these factors and demonstrate that  
11 the ALJ's consideration of the opinion was in line with the regulations. The ALJ  
12 repeatedly addressed the supportability of Dr. Lu's opinion. He found that the  
13 opined impairments and their resulting severity of symptoms and limitations were  
14 not supported. Tr. 26. The ALJ discussed how the opinion was inconsistent with  
15 Dr. Lu's treatment notes and the medical evidence in the record. Tr. 26-27.  
16 Therefore, the ALJ considered the factors in 20 C.F.R. §§ 404.1527(c), 416.927(c).

17 In conclusion, the ALJ provided legally sufficient reasons for rejecting Dr.  
18 Lu's opinion. While the first and last reasons he provided were not supported by  
19 substantial evidence, any resulting error would be considered harmless as the  
20 remaining reasons were specific and legitimate. *See Tommasetti v. Astrue*, 533  
21 F.3d 1035, 1038 (9th Cir. 2008) (An error is harmless when "it is clear from the  
22 record that the . . . error was inconsequential to the ultimate nondisability  
23 determination.").

## 24 **2. Obesity**

25 Plaintiff argues that the ALJ erred by failing to consider his obesity. ECF  
26 No. 15 at 12-13.

27 Plaintiff has a BMI both below and above 30 throughout the record: Tr. 398  
28 (March 22, 2010, BMI of 30,); Tr. 474 (May 1, 2014, BMI of 30); Tr. 479 (May

29, 2014, BMI 29.2); Tr. 511 (June 30, 2014, BMI 29.6); Tr. 501 (August 1, 2014, BMI 29.6); Tr. 552 (September 9, 2014, BMI 29.5); Tr. 530 (November 14, 2014, BMI 29.6); Tr. 629 (December 29, 2014, BMI 31); Tr. 620 (February 5, 2015, BMI 30.4); Tr. 614 (February 25, 2015, BMI 30.4); Tr. 639 (July 10, 2015, BMI 30.4). The ALJ did not address obesity in his decision. Tr. 16-29.

The Ninth Circuit has held that, under certain circumstances, an ALJ is required to include a claimant's obesity in the analysis of his functional capacity, regardless of whether he raises obesity as a disabling factor. *See Celaya v. Halter*, 332 F.3d 1177, 1181-83 (9th Cir. 2003); *see also* S.S.R. 96-8p ("In assessing [residual functional capacity], the adjudicator must consider limitations and restrictions imposed by all of an individual's impairments, even those that are not 'severe.'"). On the other hand, the mere presence of a mention in the record that the claimant was obese is insufficient to require the ALJ to explicitly consider the issue in his written opinion. *See Burch v. Barnhart*, 400 F.3d 676, 681-84 (9th Cir. 2005).

In *Celaya*, the Ninth Circuit looked to three factors in holding that the ALJ had a duty to consider the impact of obesity on the claimant's other impairments: (1) obesity was raised implicitly in the claimant's reported symptoms; (2) the claimant's obesity was close to the listing level and was a condition that could exacerbate her reported illnesses; and (3) the claimant was illiterate and unrepresented. *Id.* at 1182.

In *Burch*, the Ninth Circuit carefully distinguished and limited its earlier holding. 400 F.3d at 681-84. The *Burch* court found that that the record before it "[did] not indicate that [the claimant's] obesity exacerbated her other impairments." *Id.* "[M]ore significantly," the court noted, the claimant was represented by counsel before the ALJ. *Id.* at 682. The court also noted that the ALJ had at least acknowledged the evidence regarding the claimant's obesity. *Id.* at 684. The court therefore rejected the claimant's argument that the ALJ had

1 failed to properly consider the impact of her obesity on her other impairments. *Id.*

2 In this case, the ALJ's failure to address Plaintiff's obesity was not  
3 reversible error. First, Plaintiff was represented by counsel before the ALJ and did  
4 not raise obesity at the hearing or in his disability application. Tr. 287, 672, 702-  
5 75. Second, although Plaintiff had a BMI exceeding 30 in the record, he failed to  
6 address any evidence showing that his obesity exacerbated his other symptoms.  
7 Third, even before this Court, Plaintiff "has not pointed to any evidence of  
8 functional limitations due to obesity which would have impacted the ALJ's  
9 analysis." *Burch*, 400 F.3d at 683. Therefore, this Court finds that the ALJ did not  
10 err by omitting obesity from the decision.

### 11 **3. Residual Function Capacity and Grids**

12 Plaintiff argues that even if the above two issues were resolved in the  
13 Defendant's favor, the ALJ still erred by improperly classifying his residual  
14 functional capacity as light work and applying grid rules consistent with a light  
15 work limitation. ECF No. 15 at 13-15.

16 As noted above, if a claimant is found to be incapable of returning to his past  
17 relevant work at step four, the ALJ must show there are a significant number of  
18 jobs in the national economy that the claimant can perform at step five. *See*  
19 *Tackett*, 180 F.3d at 1098-99. The ALJ may do this through the testimony of a  
20 vocational expert or by reference to the Grids. *Osenbrock v. Apfel*, 240 F.3d 1157,  
21 1162 (9th Cir. 2000); *Tackett*, 180 F.3d at 1100-01. The Grids reflect the  
22 claimant's maximum sustained exertional work capacity. *See* S.S.R. 83-10  
23 ("exertional capabilities" are used "to identify maximum sustained work  
24 capability"). In cases, where there is a need to alternate between sitting and  
25 standing, a vocational expert "should be consulted to clarify the implications for  
26 the occupational base." S.S.R. 83-12.

27 Plaintiff asserts that because Plaintiff's residual functional capacity  
28 determination fell between sedentary and light work, the ALJ was required to

1 apply the grid rules associated with sedentary work, which would result in a  
2 finding of “disabled” on Plaintiff’s fiftieth birthday. ECF No. 15 at 14-15. In  
3 doing so, he relies on a case from the Western District of Washington, *Merritt v.*  
4 *Colvin*. *Id.* citing 2015 WL 4039355 (W.D. Wash. July 2, 2015). However, in  
5 *Merritt*, the Plaintiff was found capable of light work with the additional limitation  
6 of being precluded from standing at least six hours in an eight hour work day. *Id.*  
7 Here, Plaintiff is not precluded from standing the full number of hours associated  
8 with light work, instead he is required to alternate between sitting and standing.  
9 Tr. 22. Therefore, under S.S.R. 83-12, a vocational expert was required. The ALJ  
10 called a vocational expert and that expert provided interrogatories regarding jobs  
11 that were available in the national economy consistent with the ALJ’s residual  
12 functional capacity determination. Tr. 326-32. Therefore, the ALJ did not err at  
13 step five by relying on evidence from a vocational expert when the occupational  
14 base was eroded due to Plaintiff’s need to alternate between sitting and standing.

#### 15 **4. Plaintiff’s Symptom Statements**

16 Plaintiff contests the ALJ’s determination that his symptom statements were  
17 not entirely credible. ECF No. 15 at 16-21.

18 It is generally the province of the ALJ to make credibility determinations,  
19 *Andrews*, 53 F.3d at 1039, but the ALJ’s findings must be supported by specific  
20 cogent reasons, *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent  
21 affirmative evidence of malingering, the ALJ’s reasons for rejecting the claimant’s  
22 testimony must be “specific, clear and convincing.” *Smolen v. Chater*, 80 F.3d  
23 1273, 1281 (9th Cir. 1996); *Lester*, 81 F.3d at 834. “General findings are  
24 insufficient: rather the ALJ must identify what testimony is not credible and what  
25 evidence undermines the claimant’s complaints.” *Lester*, 81 F.3d at 834.

26 The ALJ found Plaintiff’s symptom statements to be less than fully credible  
27 concerning the intensity, persistence, and limiting effects of these symptoms. Tr.  
28 23. The ALJ reasoned that Plaintiff’s symptom statements were less than fully

1 credible because (1) his alleged severity of symptoms is inconsistent with the  
2 medical evidence, (2) there is evidence of symptom magnification, (3) his alleged  
3 severity of symptoms is inconsistent with the lack of treatment, and (4) he made  
4 inconsistent statements regarding his limitations.

5 The ALJ's first reason for finding Plaintiff's symptom statements less than  
6 fully reliable, that the severity of his reported symptoms is not supported by  
7 medical evidence, is specific, clear and convincing. Although it cannot serve as  
8 the sole reason for rejecting a claimant's credibility, objective medical evidence is  
9 a "relevant factor in determining the severity of the claimant's pain and its  
10 disabling effects." *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001).

11 Here, the ALJ made several specific findings demonstrating that Plaintiff's  
12 symptom statements were not supported by the medical evidence: "contrary to his  
13 allegations of frequent right ankle swelling, physical examinations frequently show  
14 no edema in his extremities" with multiple citations to the record showing normal  
15 examinations; "the claimant testified that he has to lie down and elevate his legs  
16 frequently throughout the week, no provider has ever prescribed that long-term"  
17 followed by a summary of the short term periods in which he was instructed to  
18 elevate his legs; and "He alleged that he has essentially no function in the right arm  
19 or shoulder. The claimant's testimony, however, is in stark contrast to the benign  
20 radiographic findings," followed by a summary of the normal imaging of the right  
21 upper extremity. Tr. 24. Plaintiff argues that the evidence the ALJ cites to support  
22 his conclusions are a misrepresentation of the record and that the ALJ is cherry-  
23 picking evidence to discredit him. ECF No. 15 at 17-18.

24 While it is error for an ALJ to cherry-pick evidence to support his findings,  
25 *Garrison v. Colvin*, a review of the record as a whole demonstrates that the ALJ's  
26 conclusions are supported by substantial evidence. 759 F.3d 759, 1017 (9th Cir.  
27 2014). As discussed at length above, Plaintiff repeatedly had normal examination  
28 results of the lower extremities. *See supra*. There is no provider who stated

1 Plaintiff would need to elevate his legs beyond episodes of cellulitis and these  
2 outbreaks occur infrequently. The first documented outbreak was in October of  
3 2009. Tr. 365. During an outbreak of cellulitis in April of 2012, Plaintiff was told  
4 to elevate his legs and avoid prolonged standing. Tr. 425. Despite treatment, the  
5 cellulitis was still present in May of 2012. Tr. 419. In July of 2014, Plaintiff had  
6 another cellulitis outbreak that lasted a week despite antibiotics. Tr. 483. He was  
7 again diagnosed with an outbreak in December of 2014. Tr. 411. During a period  
8 of active DVT in March 2010, Plaintiff admitted he was only elevating his feet at  
9 night. Tr. 398. Additionally, the imaging of Plaintiff's right upper extremity  
10 consistently showed normal or mild results. Tr. 415 (A November 24, 2012 x-ray  
11 of shoulder shows "No evidence of fracture, dislocation, or focal bony defect.");  
12 Tr. 445 (A July 27, 2013 x-ray of shoulder is unremarkable.); Tr. 475 (A May 1,  
13 2014 x-ray showed "evidence of osteoarticular abnormality. Degenerative  
14 [osteoarticular] changes with reduced glenohumeral joint space of [right]  
15 shoulder."); Tr. 604, 632-33 (An MRI of the right shoulder in March of 2015  
16 shows "mild marrow edema versus artifact in the region of the glenoid neck and  
17 base of the coracoid process of the indeterminate significance."); Tr. 593 (A May  
18 of 2015 x-ray showed "mild degenerative change of the AC joint. There is AC  
19 degenerative joint space loss."). As such, the ALJ's reason is supported by  
20 substantial evidence and is sufficient, with the other reasons provided, to support  
21 the ultimate determination that Plaintiff's symptom statements are unreliable.

22 Plaintiff challenges the ALJ's statement that "the overall evidence indicates  
23 that he retains the ability to perform light exertional work," by asserting that this is  
24 putting the preverbal cart before the horse. ECF No. 15 at 16-17. Essentially,  
25 Plaintiff argues that the ALJ supports his credible determination with the residual  
26 functional capacity determination. *Id.* A claimant's statements regarding  
27 symptoms and limitations are considered when making a residual functional  
28 capacity determination. 20 C.F.R. §§ 404.1545(a)(3), 416.945(a)(3). Therefore,

1 Plaintiff's logic is accurate, that a credibility determination cannot be justified by  
2 the resulting residual functional capacity determination. However, the ALJ's  
3 statement is not that the credibility determination is supported by the residual  
4 functional capacity determination, but that the evidence as a whole supports a light  
5 exertional level residual functional capacity. Tr. 24. Therefore, Plaintiff's  
6 statements otherwise are not consistent with the evidence. The ALJ's focus is the  
7 evidence and what the evidence supports. Tr. 24. Therefore, Plaintiff's argument  
8 is without merit.

9 Plaintiff also breaks down the ALJ's comparison of Plaintiff's statements to  
10 the medical evidence into additional categories, arguing that the ALJ rejected  
11 Plaintiff's statements because his testimony regarding his DVT, cellulitis, and need  
12 to elevate his legs were not supported by the medical evidence. ECF No. 15 at 17-  
13 18. This is all presumed to be resolved in the above determination that the ALJ  
14 cited specific reasons to demonstrate that the severity of symptoms Plaintiff  
15 alleged were not supported by the evidence in the record.

16 The ALJ's second reason for rejecting Plaintiff's symptom statements,  
17 evidence of symptom magnification, is specific, clear and convincing. An ALJ  
18 may consider a claimant's failure to give maximum or consistent effort during  
19 evaluations. *Thomas v. Barnhart*, 278 F.3d 947, 959 (9th Cir. 2002). Here, the  
20 ALJ cited to a July 2013 consultative examination in which Dr. Dreguis stated that  
21 Plaintiff demonstrated that "[t]here were inconsistencies during range of motion  
22 testing. The claimant demonstrated little range of motion in the right shoulder and  
23 right ankle, but during the interview and testing other systems, a larger range of  
24 motion was seen." Tr. 25 *citing* Tr. 443. This is a specific, clear and convincing  
25 reason to reject Plaintiff's statements.

26 The ALJ's third reason for rejecting his symptom statements, that the  
27 alleged severity is inconsistent with the lack of treatment, meets the specific, clear  
28 and convincing standard. Noncompliance with medical care or unexplained or



1 inadequately explained reasons for failing to seek medical treatment cast doubt on  
2 a claimant's subjective complaints. 20 C.F.R. §§ 404.1530, 416.930; *Fair v.*  
3 *Bowen*, 885 F.2d 597, 603 (9th Cir. 1989); *Macri v. Chater*, 93 F.3d 540, 544 (9th  
4 Cir. 1996) (finding the ALJ's decision to reject the claimant's subjective pain  
5 testimony was supported by the fact that claimant was not taking pain medication).  
6 Here, the ALJ noted twice that despite his testimony of pain in his right ankle, his  
7 treatment records showed that he failed to complain of such pain when seen by his  
8 providers. Tr. 24, 26. Plaintiff alleges that the ALJ ignored the times he did  
9 complain about his right ankle to his providers. ECF No. 15 at 19. Additionally,  
10 Plaintiff argues that he was uninsured and lacked the financial means to seek care  
11 during the period in question. *Id.*

12 Plaintiff asserts that the ALJ ignored his complaints of ankle pain and cites  
13 to an April 26, 2012 report from Dr. Southwell, Tr. 425, and a July 27, 2013 report  
14 from Dr. Drenguis, Tr. 443, 445. *See* ECF No. 15 at 19. In the report from Dr.  
15 Southwell Plaintiff complains about ankle pain stemming from cellulitis, not the  
16 prior ankle injury. Tr. 425. The July 27, 2013 report from Dr. Drenguis was a  
17 consultative examination for benefits, and does not qualify as complaints to a  
18 provider in the course of seeking treatment as Plaintiff asserts. Tr. 443, 445.

19 Plaintiff also claims lack of insurance and financial means kept him from  
20 seeking treatment. However, the record shows that while he may have gone for a  
21 period without health insurance, he was a recipient of Medicaid during the relevant  
22 time period. Tr. 408, 412, 417, 421, 453, 464, 467, 469, 473, 477, 481, 500, 509,  
23 529, 539, 542, 551, 556, 561, 606, 609, 616-17, 629, 637, 719. During this time,  
24 he sought treatment for his other impairments. *Id.* Therefore, a failure to seek  
25 treatment for his ankle injury while he was insured supports the ALJ's rationale  
26 that his ankle impairment was not as severe as he alleged. Therefore, this reason  
27 meets the specific, clear and convincing standard.

28 The ALJ's fourth reason for rejecting his symptoms statements, that he made

1 inconsistent statements regarding his limitations, meets the specific, clear and  
2 convincing standard. The ALJ may consider “ordinary techniques of credibility  
3 evaluation, such as the claimant’s reputation for lying, prior inconsistent  
4 statements . . . and other testimony by the claimant that appears less than candid.”  
5 *Smolen*, 80 F.3d at 1284. Here, the ALJ found that in July of 2013, Plaintiff stated  
6 that he could lift up to 20 pounds and had no difficulty reaching objects on higher  
7 or lower shelves. Tr. 25 *citing* Tr. 443. Yet in the very next month, Plaintiff  
8 reported that he was seen in November of 2012 and was told his shoulder was  
9 separated and he was not to lift more than ten pounds. Tr. 25 *citing* Tr. 451. A  
10 review of the November 2012 treatment notes addressing Plaintiff’s shoulder  
11 injury included an x-ray demonstrating no evidence of fracture, dislocation, or  
12 focal bony defect. Tr. 415. Plaintiff was diagnosed with a possible rotator cuff  
13 injury vs. tendonitis. Tr. 416. There was no lifting limitation assigned. Tr. 414-  
14 17. Plaintiff argues that he is not a medical provider and should not be put at a  
15 disadvantage for not using the correct medical term when describing his injury.  
16 ECF No. 15 at 20. However, the issue is not Plaintiff’s misidentifying the medical  
17 term, the issue is that in two statements made a month apart, he provided two  
18 lifting limitations. This inconsistency is sufficient to support the ALJ’s  
19 determination that his reported symptom severity may not be reliable.

20 In conclusion, the ALJ’s determination that Plaintiff’s symptom statements  
21 were less than fully credible is supported by substantial evidence and legally  
22 sufficient reasons. This Court will not disturb the ALJ’s determination.

### 23 CONCLUSION

24 Having reviewed the record and the ALJ’s findings, the Court finds the  
25 ALJ’s decision is supported by substantial evidence and free of harmful legal error.  
26 Accordingly, **IT IS ORDERED:**

27 1. Defendant’s Motion for Summary Judgment, **ECF No. 19**, is  
28 **GRANTED.**

1           2.     Plaintiff's Motion for Summary Judgment, **ECF Nos. 14, 15**, is  
2 **DENIED.**

3           The District Court Executive is directed to file this Order and provide a copy  
4 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Defendant**  
5 and the file shall be **CLOSED.**

6           **IT IS SO ORDERED.**

7           DATED July 9, 2018.

A handwritten signature in black ink, appearing to be "M" or "Rodgers", is written above a horizontal line.

JOHN T. RODGERS  
UNITED STATES MAGISTRATE JUDGE